(Stephen J. Patsfall 0012271)
Attorney for Defendant Condon

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

RONALD MELTON, et al.,	:	**Case No. C-1-01-528**
	:	**(Spiegel, J.)**
Plaintiffs,	:	
	:	
v.	:	**DEFENDANT THOMAS CONDON'S MOTION FOR SUMMARY JUDGMENT**
	:	
BOARD OF COUNTY COMMISSIONERS OF HAMILTON COUNTY, OHIO, et al.,	:	
	:	
Defendants.	:	

Defendant Thomas Condon, (hereinafter "Condon"), by and through counsel, hereby respectfully moves this court pursuant to Rule 56 of the Federal Rules of Civil Procedure for a judgment dismissing the remaining claim against him, for the reason that there are no genuine issues of material fact and he is entitled to judgment as a matter of law. The reasons in support of this motion are more particularly set forth in the accompanying Memorandum.

Respectfully submitted,

s/Stephen J. Patsfall
Stephen J. Patsfall 0012271
1 West Fourth Street
Suite 1800
Cincinnati, Ohio 45202
(513) 721-4500
Attorney for Defendant
spatsfall@pyplaw.com

OF COUNSEL:

Patsfall, Yeager & Pflum

MEMORANDUM

I. PROCEDURAL HISTORY AND INTRODUCTION:

By orders filed December 11, 2002 and May 7, 2003, this Court has dismissed all claims against Condon in the within cause with the exception of plaintiffs' claim brought under 42 U.S.C. Section 1983 (docket no. 56, Ex. 1; docket no. 66, Ex. 2). Of course the Court in ruling on the motions to dismiss was required to assume that the allegations in the Second Amended Complaint against Condon were true, and relied specifically on those allegations of conduct in allowing the Section 1983 claim against Condon to stand. The Court held:

> "Most people would not consider the corpses of their loved ones as fair game, without permission, for a stranger's photography project. Defendant's conduct could very well be considered outrageous. It is for this reason that the Court shall maintain jurisdiction over the Section 1983 claim based upon a violation of substantive due process by actions that 'shocked the conscience'."

(See 12/11/02 Order, Ex. 1). The Court's May 7, 2003, Order also upheld Plaintiff's deprivation of property claim when it held:

> "According to the allegations, which for the purposes of evaluating this motion the Court must assume to be true, Defendant Condon photographed, posed, touched, manipulated, came into possession of photographs, and/or otherwise abused and/or violated the corpse of the decedent, Perry Melton, for purposes of commercial exploitation."

(See 5/7/03 Order, Ex. 2, p. 6).

In so ruling, this Court had to assume as true allegations made by the plaintiffs in their Second Amended Complaint that are now known to be completely false. The plaintiffs alleged in their Second Amended Complaint that Condon photographed, posed, touched, manipulated, abused and violated the corpse of Perry Melton for commercial exploitation. Since this Court issued its orders, defendant Dr. Tobias has been absolved of all criminal charges by the First District Court of

Appeals of Ohio, allowing him to waive his Fifth Amendment rights and give deposition testimony in both this case and in the case of *Chesher, et al. v. Neyer, et al.* Case No. C-1-01-566 (consolidated with case no. C-1-01-771), also pending before this Court. The parties in this case have stipulated that the transcripts of the deposition of Dr. Tobias in the *Chesher* case can be filed and used in the instant case. (Tobias depo [Melton] pp. 6-7).

Dr. Tobas' deposition testimony establishes that it was Dr. Tobias who took the photographs at issue of the corpse of Perry Melton in the course and scope of his employment, that Condon had nothing to do with the photographing of Perry Melton's corpse, and that Condon did not photograph, pose, touch, manipulate, or access the corpse of Perry Melton. The undisputed evidence is that Condon never expressed any interest for the use of the image, never intended to use the photographs for his photography art project or any commercial use, and that the photographs were taken and developed by Dr. Tobias solely for Tobias' employment related purposes. Simply put, with respect to taking or using of the photographs of the decedent Perry Melton, there was no conduct of Condon at all, much less conduct that would "shock the conscience". This memorandum will show that there are no genuine issues of material fact as to plaintiffs' Section 1983 claim against Condon, and that he is entitled to be dismissed from this action as a matter of law.

II. UNDISPUTED FACTS:

Dr. Jonathan Tobias was a pathology fellow at the Hamilton County Coroner's office from July 2000 until January 16, 2001. (Tobias depo. [Chesher] pp. 26, 387). As a fellow, he was trained by Dr. Pfalzgraf, Dr. Schultz, Dr. Utz and Dr. Parrott. Id. at 26, 27. His pathology duties included taking photographs of death scenes and taking photographs of bodies in order to record their conditions for future investigation. Id. at 29, 34. He was told to take many photographs at death scenes to be sure to record important details that may later be discovered through examination of the photographs. Id. at 34. Once the bodies were transported to the

Coroner's office, he was told to take photographs of the bodies on the autopsy table before the autopsy began and as needed during the autopsy. Id. at 42-45. The Hamilton County Morgue did not have a facility to develop photography prints, so Dr. Tobias often developed the negatives in a bathroom in his home. Id. at 167, 168. Neither Dr. Tobias or the Coroner's office had the equipment to turn the negatives into prints. Id. at 168. Dr. Tobias and photographer Thomas Condon had developed a friendship, and at Tobias' request Condon allowed Tobias to use his photography studio and equipment. Id. at 80-81.

While working at the Coroner's Office one day, Dr. Tobias learned that Perry Melton had been killed. Id. at 108. Nancy Woolum, an investigator for the coroner's officer, went to Mr. Melton's death scene and took photographs for the coroner's office. Id. at 108, 118. Dr. Tobias did not attend the death scene with Ms. Woolum and did not take any photographs there. Id. at 118. Dr. Tobias believed he would be performing Melton's autopsy the next day, so after Mr. Melton's body had been delivered to the Coroner's Office, Dr. Tobias took a photograph of the body. Id. at 109. He took only one photograph because he used the last exposure on the roll of film for the photo. Id. at 109. He intended to develop the roll of film that night and study the photograph of Melton's body in preparation for the autopsy. Id. at 109.

That evening, he developed the roll of film into negatives in the bathroom in his home. Id. at 111. He took the negative to Condon's studio and developed it into three prints. Id. at 115. Condon had previously showed him how to use the equipment. (Tobias depo [Melton] at 25). He left the prints at the studio to dry and he was going to return to do the toning process on the images. (Tobias depo [Melton] p. 25). He took the negative back to his home that night. (Tobias depo [Chesher] at 414). He intended to return to finish the prints and take them all with him. He was going to put one print in the Coroner's Office files and keep the rest for his teaching files. Id. at 117. He does not believe the prints had gone through the toning process when the police conducted a search at Condon's studio and seized them. Id. at 116. Dr. Tobias ended up not performing Mr. Melton's autopsy. Id. at 118-19. Dr. Pfalzgraf performed the autopsy and may have taken additional photographs. Id. at 118.

Condon did not access, view, manipulate or photograph Mr. Melton's body in any manner whatsoever, nor did he aid in accessing, viewing, manipulating or photographing Melton. Id. at 415, 235. Condon did not ask him to take the image, and Condon was not aware that he was taking the image when it was taken. (Tobias depo [Melton] p. 126). Condon never asked Tobias to develop the photograph, and never asked Tobias to bring the negative over to his studio. (Tobias depo [Melton] p. 126). Tobias testified that Condon had no intention to and never did use the photograph for any reason. (Tobias depo [Melton] p. 126). After the entire process was finished Tobias was going to take the photographs in the final form to use for his own purposes. (Tobias depo [Melton] pp. 128-129). Condon had nothing to do with the Melton case. (Tobias depo [Chesher] at 415). The Melton case had nothing to do with Condon's project. Id.

III. ARGUMENT:

A. Standard of Review

Summary judgment is proper when there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In considering such a motion, the court construes all reasonable factual inferences in favor of the nonmoving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). The central issue is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). No genuine issues of material fact exist in this case, and Condon is entitled to judgment as a matter of law.

B. Application of Law

To state a claim under Section 1983, a Plaintiff must demonstrate that a Defendant (1) deprived the Plaintiff of rights, privileges or immunities secured by the Constitution or laws of the United States; and (2) acted under color of state law. West v. Atkins , 487 U.S. 42, 48 (1988).

1. Condon did not deprive the Plaintiffs of their Right to Privacy or Publicity.

Plaintiffs have alleged that Condon violated their right to privacy by acts associated with photographing and abusing the corpse of their relative, Perry Melton. Condon asserts that (1) no privacy right exists for the plaintiffs; and (2) even if it did, Condon did nothing to violate this right.

The United States Court of Appeals for the Sixth Circuit has held, "One can collect only for invasion of one's own privacy." Cordell v. Detective Publications, Inc., 419 F.2d 989, 991 (6th Cir. 1969). Furthermore, the right of action for invasion of privacy "lapses with the death of the person who enjoyed it, and one cannot recover for this kind of invasion of the privacy of a relative, no matter how close the relationship." Id., See Young v. That Was the Week That Was, 423 F.2d 265, 265-66 (6th Cir. 1970). The Sixth Circuit has followed the weight of authority in upholding this rule and has noted that "the majority of jurisdictions which have considered the issue have declined to recognize a relational tort." Id. at 992 (citing notes 2-4). This position is also consistent with the Restatement of Torts 2d, which provides:

> The right protected by the action for invasion of privacy is a personal right, peculiar to the individual whose privacy is invaded. The cause of action is not assignable, and it cannot be maintained by other persons such as members of the individual's family, unless their own privacy is invaded along with his.

Restatement of Torts, 2d § 652 I (1977), See also W. Prosser, Law of Torts, 4th Ed., p. 815 (1971). Accordingly, as recognized by the Sixth Circuit, the majority of other circuits and the Restatement, no right of privacy exists for the Plaintiffs. As none exists, Condon could not have violated such right in any manner.

Even if the Sixth Circuit does recognize a privacy right for the Plaintiffs, Condon took no action that would violate such a right. The undisputed evidence is that Condon never photographed, posed, touched, manipulated, abused or violated the corpse of Perry Melton. Dr. Tobias has stated unequivocally that Condon never accessed, viewed, manipulated or photographed Perry Melton. (Tobias Deposition 235, 415). The fact that Dr. Tobias left prints of the image at Condon's studio to dry is not evidence of any conduct on the part of Condon, much less evidence of a violation of Plaintiff's privacy or due process or other constitutional rights that "shocks the conscious". It is undisputed Condon did not access, view, manipulate or photograph the corpse of Perry Melton. Accordingly, Plaintiffs' Right to Privacy and Publicity claims against Condon in the within cause should be dismissed, with prejudice.

2. Condon did not violate Plaintiffs' procedural due process rights.

One can establish a procedural due process claim by demonstrating: (1) a liberty or property interest protected by the due process clause; (2) a deprivation of that protected interest within the meaning of the due process clause; and (3) Defendants' failure to afford adequate procedural rights prior to the deprivation. Hahn v. Star Bank, 190 F.3d 708, 716 (6^{th} Cir. 1999). Plaintiffs have failed to establish that they were deprived of a protected liberty or property interest by Defendant Condon.

The deposition testimony of Dr. Tobias shows that Condon never took a single photograph of Mr. Perry Melton. In fact, the photograph in question was taken by Dr. Tobias in the Hamilton County Morgue, while in the course and scope of his employment with the Corner's Office. Dr. Tobias' undisputed testimony also established that Defendant Condon never accessed, viewed, manipulated or photographed Mr. Melton's body in any manner whatsoever. If Plaintiffs did have a liberty or property interest in Mr. Melton's body or photograph, and if they were deprived of such an interest, it was certainly not Defendant Condon who deprived them of these rights. Likewise, Defendant Condon had no duty to afford adequate procedural rights prior to the deprivation, if any, because it is clear that Condon took no part in the alleged deprivation.

Defendant Condon was not in the morgue at the time that Dr. Tobias took the photograph of Mr. Melton's body. Additionally, it was Dr. Tobias who removed the film from the morgue and took it to his home. Thereafter, Dr. Tobias developed the film into negatives at his home and took the negatives to Defendant Condon's studio. At Defendant Condon's studio, it was Dr. Tobias who developed the negatives into prints and left them at the studio. At no time did Defendant Condon ever participate in any of these activities. Finally, Dr. Tobias testified that Condon had no intention to, and never did, use the photograph for any reason.

3. Condon did not deprive the Plaintiffs of substantive due process.

A claim for substantive due process must be based either on a violation of an explicit constitutional guarantee or on behavior by a state actor that shocks the conscious. Braley v. Pontiac, 906 F.2d 220, 224-225 (6th Cir. 1990). In this Court's Order of December 11, 2002 (attached hereto as Exhibit 1), this Court held that it, for the time being, "shall maintain jurisdiction over the §1983 claim based upon a violation of substantive due process by actions that 'shock the conscious'." Id. at p. 6.

However, since the issuance of that Order, Dr. Tobias has testified that it was he who photographed Mr. Perry Melton's body, removed the film from the Hamilton County Morgue and took that film to Defendant Condon's studio. Additionally, Dr. Tobias testified that it was he who developed the film and left it at Condon's studio so that he could return at a later date to finalize the developing process. He also testified that Defendant Condon had absolutely no role in these activities whatsoever. Accordingly, it cannot be said that Defendant Condon participated in any actions that "shocked the conscious." Because Defendant Condon never accessed, viewed, manipulated or photographed Mr. Melton's body and did not develop or use the photographs of Mr. Melton's body, he did not deprive Plaintiffs of their substantive due process rights. Accordingly, this claim against Condon should be dismissed as a matter of law.

4. Condon did not deprive Plaintiffs of their rights of equal protection of the law.

Plaintiffs' equal protection claim is not based on being part of a protected class or discriminatory conduct, it simply alleges a violation of equal protection. (Second Amended Complaint, ¶92). In Willowbrook v. Olech, 528 U.S. 562, 564 (2000), the United States Supreme Court recognized an equal protection claim brought by a "class of one," where a Plaintiff simply alleges that he or she has been intentionally treated differently from others similarly situated and that there is no rationale basis for the difference in treatment. Presumably, this is what Plaintiffs are claiming in their Second Amended Complaint.

However, the evidence shows just the opposite. In all criminal investigations, either an investigator for the Corner's office or a pathologist takes death scene photographs for the Corner's Office. Once the body in question is delivered to the Corner's office, additional photographs are taken. Due to the fact that the Hamilton County Morgue did not have a facility to develop the photographs, the investigators or pathologists often developed the film at an outside location.

The events that took place with respect to Mr. Melton's body, and the photographs thereof, were the same events that take place with respect to the body, and photographs thereof, of all other crime victims that come into the possession of the Hamilton County Corner's Office. Accordingly, the Plaintiffs were treated in the exact same manner as the family members of other decedents that pass through the Hamilton County Corner's office as part of a criminal investigation. And again, clearly, no action of Defendant Condon can be said to have deprived Plaintiffs of any right, including equal protection of the law.

5. Condon did not deprive Plaintiffs of property.

Plaintiffs' Second Amended Complaint alleges that Condon deprived them of certain property. However, these allegations are now known to be completely false according to the deposition testimony of Dr. Tobias. As this Court is aware, Dr. Tobias testified that it was he who photographed Mr. Melton's body and removed the film from the Coroner's Office. Dr. Tobias also testified that Condon neither asked him to take the photograph, nor asked him to remove the photograph from the Coroner's Office. Moreover, Dr. Tobias testified that Condon had no intention to, and never did, use the photograph for any reason. To be exact, Dr. Tobias testified that Condon had nothing to do with the Melton case. Accordingly, such claims against Condon should be dismissed.

6. Condon's actions were not taken under color of state law.

A private party acting on his own cannot deprive a person of Constitutional rights. See Flagg Brothers Inc. v. Brooks, 436 U.S. 149 (1978). To state a claim under 42 U.S.C. § 1983, a plaintiff must demonstrate that even though a defendant is a private party, his actions may be fairly attributable to the state. Lansing v. City of Memphis, 202 F. 3d 821 (6th Cir. 2000). This is done by showing that the defendant acted under the color of state law. West v. Atkins, 487 U.S. 42, 48 (1988). To determine whether a private party is acting under the color of state law, the Supreme Court has established three tests: the public function test, the state compulsion test, and the symbiotic relationship test. West v. Atkins, 487 U.S. 42 (1988), Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970), Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961). Condon's actions do not constitute state action under any of the tests.

a. Condon's actions fail the public function test because he did not exercise any powers traditionally reserved exclusively to the state.

The public function test requires that the private party exercise powers that are traditionally exclusively reserved to the state. Wolotsky v. Huhn, 960 F.2d 1331, 1335 (6th Cir. 1992). Condon was a professional private photographer and allowing the use of his studio is not a power traditionally exclusively reserved to the state.

b. Condon's actions fail the state compulsion test because the state did not exercise such coercive power over him that his choice was that of the state.

The state compulsion test requires that a state exercise such coercive power or provide such significant encouragement, either overt or covert, that in law the choice of a private actor is deemed to be that of the state. Wolotsky at 1335. More than mere approval or acquiescence in the initiatives of the private party is necessary to hold the state responsible for those initiatives. Id. In this case, Condon allowed Dr. Tobias the use of his equipment because of a friendship between the two. Neither Dr. Tobias nor anyone else at the Coroner's office coerced Condon into anything.

c. Condon's actions fail the symbiotic relationship test because there was not a sufficiently close nexus between the state and Condon's conduct.

Under the symbiotic relationship, or the nexus test, the action of a private party amounts to state action when "there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself." The state must be "intimately involved in the challenged private conduct" for the conduct to be fairly attributed to the state. Wolotsky at 1335. There is no clear standard for identifying a sufficiently close nexus, but the Supreme Court has identified the following instances in which there is not a symbiotic relationship: extensive state regulation, public funding or private use of public property, the minority presence of public officials on the board of a private entity, the approval or acquiescence of the state in private activity, and utilization of public services by private actors. Lansing at 830. In this case, Condon simply allowed Dr. Tobias to use his studio and equipment, but neither Dr. Tobias nor anyone in the Coroner's office exercised power over Condon. Condon allowed Dr. Tobias to use his studio and equipment because of their friendship, not because the state was coercing him to do so.

Because all three tests fail, Plaintiffs cannot establish that Condon was acting under the color of state law. For this reason, Condon is entitled to judgment as a matter of law dismissing the claims under 42 U.S.C. § 1983.

IV. CONCLUSION:

It is undisputed that Defendant Thomas Condon never accessed, viewed, manipulated or photographed Mr. Melton's body. It is undisputed that he never developed the photograph or intended to use it, that it was Dr. Tobias' photo, and Dr. Tobias was going to use it solely for his own purposes. Accordingly, Defendant Thomas Condon respectfully requests that this Court grant his Motion for Summary Judgment and dismiss all claims against him, as there are no genuine issues of material fact and he is entitled to judgment as a matter of law.

Respectfully submitted,

s/Stephen J. Patsfall

Stephen J. Patsfall 0012271
1 West Fourth Street
Suite 1800
Cincinnati, Ohio 45202
(513) 721-4500
Attorney for Condon
spatsfall@pyplaw.com

OF COUNSEL:

Patsfall, Yeager & Pflum

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of February, 2004 the foregoing was filed electronically with the Clerk of Court using the CM/ECFF system which will send notification to the following: a copy of the foregoing Motion for Summary Judgment was served by ordinary U.S. mail on David W. Kapor, Esq., and Michael B. Ganson, Esq., **Attorneys for Plaintiffs,** Lawrence E. Barbiere, Esq., **Attorney for Defendant Parrott,** Glenn V. Whitaker, Esq., **Attorney for Defendant Tobias,** Louis F. Gilligan, Esq. and Jamie M. Ramsey, Esq., **Attorneys for Hamilton County,**

s/Stephen J. Patsfall
Stephen J. Patsfall